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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHANNA THO, Defendant and Appellant.	B186151 (Los Angeles County Super. Ct. No. BA275100)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Bruce Zucker, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Channa Tho appeals from a judgment entered following a jury trial in which he was convicted in count 2 of second degree robbery (Pen. Code, § 211) and in count 3 of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) with the finding as to count 2 that he personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b) and the finding by the court that appellant served two prior prison sentences within the meaning of Penal Code section 667.5, subdivision (b).[1] Appellant was sentenced to a total of 17 years in prison comprised of the upper term of five years for count 2, plus a consecutive term of 10 years for the firearm use and a consecutive one-year term for each prior prison term enhancement. For count 3, the court selected the middle term of two years to run concurrent with the sentence in count 2. Appellant contends he was unfairly prejudiced by the prosecutor's assertion of irrelevant and inflammatory matter, that he received ineffective assistance of counsel, that the order for restitution was invalid, and that imposition of the upper term on his robbery conviction violated his Sixth and Fourteenth Amendment rights to a jury trial and due process. For reasons explained in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On August 31, 2004 at approximately 11:00 p.m. when Luis Guerra was taking out the trash, appellant rode up to him on a bicycle and asked him for a bus token. Appellant then asked Mr. Guerra if the chain he was wearing was gold and

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[1] The jury also found the offense in count 2 was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1). The trial court, however, granted appellant's motion for new trial as to this enhancement and later dismissed the count in the interest of justice pursuant to Penal Code section 1385.

when Mr. Guerra responded that it was, appellant pulled out a gun, pointed it at Mr. Guerra and took the chain. Appellant told Mr. Guerra, "[I]f you call the cops . . . I know where you live . . . ." Appellant said "Fuck Florence." Mr. Guerra knew "Florence" to be a gang.[2] Mr. Guerra was "face to face" with appellant for approximately three to five minutes and then appellant rode away. The chain was thick and worth approximately one thousand dollars. Appellant was wearing blue jeans under "some black sweats" and a blue jacket or black sweater.
Mr. Guerra's mother told him to call the police, but he did not want to do so. He planned to get the chain back himself. He lives in the projects where a lot of gang members live and did not want to make "such a big deal over a chain." Where he was living at the time, it was not a good thing to talk to the police all of the time. "You get in trouble for it." He did call the police, however, and approximately 10 or 15 minutes later, they arrived. He described to the police the robber and the writing the robber had on his bicycle. He saw the letters "O-B-Z" and "C-K" on the bike. The letters "C-K" mean "Crip Killer." "O-B-Z" stands for "Oriental Boyz," which is a gang in the Pueblo Del Rio Housing Projects. Mr. Guerra had heard that appellant was "trying to jack the other homey's bike, a little homey" but had not seen appellant before. Not more than 20 minutes after the robbery, the police took Mr. Guerra to a nearby location where he positively identified appellant as the robber. It was stipulated that appellant had been convicted of a felony prior to August 31, 2004.

Officer Leonardo McKenzie testified that he spoke to Mr. Guerra, just outside his residence, early in the morning on September 1, 2004. Mr. Guerra described the suspect's bicycle as being white and "having the words of OBZ CK

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[2] It was stipulated that at the preliminary hearing he testified appellant said, "Fuck Florence or Fuck this."

written on the frame in black ink." When Officer McKenzie detained appellant, the bicycle in the area of appellant had those letters on its frame; and appellant was wearing dark clothing, similar to the description given by Mr. Guerra. It took Officer McKenzie less than five minutes to respond to the radio call that brought him to Mr. Guerra and it took him five to ten minutes more to find appellant.

DISCUSSION

I

Appellant contends his conviction must be reversed because the prosecutor's improper assertion of an irrelevant and inflammatory matter not in evidence unfairly prejudiced appellant's right to receive a fair trial. He cites to the prosecutor's closing argument wherein he stated, "Counsel keeps talking about the fact that Luis Guerra doesn't care, he doesn't care about picking out the right guy, he doesn't care about this crime, he doesn't care. [¶] I think those of you who know the area, or similar areas, know that he can't afford to care. He can't afford to care. It's dangerous for him to care. It was dangerous for him to call the police in the first place. It's dangerous for him to come to court and pick out a gang member and say this is the guy who robbed me." Appellant objected that it was "Improper argument" and that there was "no evidence of that."

The court overruled the objection stating that while there was no evidence of any fear by the witness in relation to the defendant or anyone associated with the defendant, Mr. Guerra did testify about fear in general and that was an appropriate subject upon which to comment.

While appellant claims the argument was not based on facts shown by the evidence, the record reflects that it was. Mr. Guerra testified that appellant threatened him if he called the police. Appellant stated he knew where Mr. Guerra lived. Additionally, Mr. Guerra testified about his reluctance to

report the incident to the police. He preferred to get the chain back himself, he lived in the projects where a lot of gang members lived, he did not want to make "such a big deal over a chain," and because of where he lived, it was not a good thing to talk to the police, because "you get in trouble for it."

Appellant objects to the prosecution's use of the phrase, "this environment of terror" asserting it was an "allusion[] to the global fear of terrorism." Preliminarily we note appellant did not object to this remark or request an appropriate admonition and, therefore, forfeited any contention that this remark constituted misconduct. (See *People v. Earp* (1999) 20 Cal.4th 826, 858.) Apart from any forfeiture, a reasonable reading of the record reveals that the environment referred to was not global terrorism but rather the gang environment testified to by Mr. Guerra. (See *People v. Dennis* (1998) 17 Cal.4th 468, 522.)

II

Appellant claims he received ineffective assistance of counsel in that his trial counsel failed to object to hearsay evidence referring to an unrelated and uncharged crime that prejudiced his case. Appellant claims the hearsay testimony "gave the jury the false impression that appellant was a serial robber in a case in which two robberies were alleged." Mr. Guerra testified that although he had never met appellant, he had heard about him, that appellant had been "trying to jack the other homey's bike, a little homey."

As the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim must be rejected. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Additionally, appellant has failed to show that there is a reasonable probability that but for counsel's alleged error, the result of the proceeding would have been different. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

III

Appellant contends the trial court's failure to hold a restitution hearing renders the order for restitution invalid. He notes that the trial court ordered him to make restitution to the victim in the amount of $800 but did not give him an opportunity to contest the reasonableness of the award or notice of the amount or basis for the award.

"[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. . . . [¶] (1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. . . ." (Pen. Code, § 1202.4, subd. (f).)

Mr. Guerra testified that his gold chain was worth approximately $1,000. The defense cross-examined him regarding that value, stating that previously he had claimed the gold chain was worth $800. In imposing restitution, the trial court noted that "the amount was disputed, or there was some differing evidence at trial" and accepted the argument of the defense and ordered $800 as restitution. Appellant made no request for any further opportunity to dispute the amount of restitution. (See *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1160.)

Further, pursuant to Penal Code section 1202.4, subdivision (f), appellant was on notice that restitution to the victim would be ordered. That code section provides "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim . . . in an amount established by court order, based on the amount of loss claimed by the victim . . . or any other showing to the court." (*Id.*) Further, the court is required to order "full restitution unless it finds compelling and extraordinary reasons for not doing so . . . ." (*Id.*) Appellant was on notice that the trial court would order full restitution to the victim based on the showing made to the court.

IV

Appellant contends he was improperly sentenced to the upper term in violation of his federal constitutional rights to a jury trial and due process. (*Blakely v. Washington* (2004) 542 U.S. 296.) He claims the trial court erroneously imposed an upper term based on its own findings of aggravating facts that were not tried or found true by a jury. He recognizes that this court is bound to follow the holding of *People v. Black* (2005) 35 Cal.4th 1238, but asserts he is making this argument to preserve it for federal review.

In *People v. Black, supra*, 35 Cal.4th 1238, 1254, the California Supreme Court held that *Blakely* does not invalidate California's upper-term sentencing procedure. Appellant's argument raises no issues not resolved in *Black*.[3] We are

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[3] The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___ U.S. ___ [126 S.Ct. 1329], on the issue of whether *Blakely* applies to California's determinate sentencing law.

bound to follow decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P.J.

MANELLA, J.